IN THE UPPER TRIBUNAL **Appeal No.** CE/1161/2016

ADMINISTRATIVE APPEALS CHAMBER

Before Judge S M Lane

The appeal is dismissed. The decision of the First-tier Tribunal did not involve the making of any material error of law.

REASONS FOR DECISION

1 The appellant brings this appeal with my permission. The issue is whether the F-tT erred in law by failing to adjourn her appeal against a decision terminating her entitlement to ESA (Employment and Support Allowance) on the basis that she did not have limited capability for work. Her representative submits that the Tribunal should have adjourned in order to call for a previous WCA (Work Capability Assessment).

2 There are several problems with this. The appellant, who had requested a hearing on the papers, had not mentioned any previous ESA claims or decisions relating to any claims. That, as it turns out, is not surprising since she failed her previous WCA and had been claiming JSA for some 9 months before re-claiming ESA. The Secretary of State did not include a history of previous claims and decisions, or previous WCA papers, in his Submission. This is also not surprising since the appellant had failed her last WCA and claimed JSA for many months. There is no obvious relevance of the previous papers to the current decision in these circumstances.

3 It is also not surprising that, in the absence of any indication by the appellant that her previous claim history might be relevant, that the F-tT decided that it was appropriate to proceed on the evidence it had and dismiss the appeal.

4 Following the F-tT's decision, the appellant consulted a welfare advice organisation. The representative discovered that the appellant had gone through a WCA in connection with an earlier claim though she was found not to have limited capability for work. The appellant told the representative that she had previously scored 12 points, but we now know that she scored only 9 points.

5 In the circumstances set out above, even the most diligent Tribunal would not have recognised that a previous ESA85 might have existed and might have been relevant to the present decision. I gave permission to appeal on the basis that it was worth exploring whether the Secretary of State should have included it in the papers or adjudication history; if he should have done so, whether the Secretary of State's failure meant that the F-tT made an error of law in its decision; and finally whether it could be said that the F-tT failed in the performance of its inquisitorial duty by not adjourning to find out more.

6 The Secretary of State did not support the appeal. He did, however, supply an adjudication history and the most recent previous ESA85 (the health care professional's report for the purposes of the WCA). The adjudication history showed that

(a) she received **JSA** from 29 July 2012 – 8 August 2012;
(b) she received **ESA** from 9 August 2012 to 28 February 2013;

(c) she received **JSA** from 27 March 2013 to 27 November 2013;
(d) she received **ESA** from 28 November 2013 to 19 July 2015 inclusive.

7 In view of the break in the ESA claim history of some 9 months (from 28 February 2013 to 28 November 2013) and the lack of any record to show that the appellant appealed termination of the ESA award that ended on 28 February 2013 (item b, above), the Secretary of State submitted that the previous papers were not relevant. He submitted that the F-tT could have adjourned to obtain the previous report but was entitled not to do so. This is not an entirely attractive argument since the F-tT had no idea that there were ESA previous decisions. On the other hand, the continuation of her medical conditions and disability, and her previous success or failure at a WCA is something the appellant certainly knew about should have mentioned if she thought it had any relevance.

8 The appellant's representative replied that the award history itself did not show whether the ESA85 contained evidence relevant to the current assessment. Nor did the receipt of JSA for several months in 2013 render the previous report irrelevant. It was not possible to tell, he submitted, whether the appellant's condition got better, worse or remained the same at the date of the decision in issue in this appeal. He does note, however, that the previous ESA85 which the Secretary of State now provided showed the same health conditions as those in the current report and that she had previously been awarded points for mobilising (1b). For example, the HCP had recorded in the previous ESA85 that the appellant felt she had to stop if she walked for 10 minutes, due to pain. He submitted that this was highly relevant, and had the previous report been in the papers, the Tribunal would have asked further questions about the appellant's need to stop and rest. He points out that there was otherwise a dearth of evidence on this point.

9 That is an over-optimistic submission for several reasons:

(i) the appellant was awarded points previously *because she could not mount or descend two stairs,* having only one handrail on the staircase. Her asserted difficulties with walking for 10 minutes did *not* attract points;

(ii) the appellant's evidence to the current HCP (p47) painted a very different picture from that which she presented to the previous HCP. At the previous face-to-face interview she was, for example, wearing compression bandages for her ankles and lower legs, could only do little bits of housework at a time and had to stop if walking after 10 minutes due to pain. She took aspirin daily for pain. In the most recent report (which took into account her arthritis (p45)) she was only taking aspirin for blood thinning, was able to travel on her own by bus and taxi, was able to manage the stairs and her activities of daily living, did all of the cooking (unless something was heavy), did all of the housework, 'walks 10 minutes to the near shop, buys what fits in the shopping trolley and carries back home, crosses roads safely and goes alone; when she does a big shop she walks to the supermarket, walks slowly takes her 15 – 20 minutes to get there, walks around there for about 30 minutes picks the items she needs and then gets them delivered….Manages the stairs holding on the rail'. There was no mention of stopping nor of wearing bandages (previously described by her as being required 'long term'). This evidence was significantly inconsistent with the previous report.

(iii) the Three Judge Panel's decision in *FN v Secretary of State for Work and Pensions* [2015] UKUT 670 (AAC) (CSE/19/2014)[1] is such that the representative's arguments cannot succeed.

10 The Three Judge Panel in *FN* considered the responsibilities of an F-tT where the Secretary of State did not provide documentation associated with the adjudication history or omitted even to refer to the existence of such assessments and reports in his response to the appeal.

11 It is clear from the decision that an F-tT is not obliged as a matter of law to have before it the evidence of a claimant's previous assessment in connection with WCA or PCA in each and every case, nor does the Tribunal automatically err in law where the Secretary of State has failed to produce the previous adjudication history or associated papers. The decision of a Three Judge Panel is binding on the Upper Tribunal, a case with which I respectfully agree in any event.

12 *FN* sets up a two part test with (i) a triggering condition and (ii) break-in-the-chain–type condition. The Three Judge Panel approved of, and adopted, the first part of § 37 in Upper Tribunal Judge Wright's decision in *ST v Secretary of State for Work and Pensions* [2012] UKUT 469 (AAC):

> 37 'where, as here, it is plain from what is being said by or on behalf of the claimant that she is no better (and maybe even worse) since she was last awarded ESA or was last subject to a Limited Capability for Work Assessment and where (as here) there has been no relevant supervening event such as a change in the law or a successful medical operation' It is, of course, open to an F-tT to direct the Secretary of State to produce evidence on the adjudication history or previous reports if it considers that that evidence may be relevant.

13 But as the decision makes clear, the tribunal is not liable for the Secretary of State's fault, but only for its own failure (if any such has occurred) to carry out its inquisitorial function properly. It is important to bear in mind that the Secretary of State has for some years routinely provided the most recent previous ESA85 in the Submission bundle.

14 The routine production of vintage reports, however, is unlikely to assist a tribunal. This is because the disabilities arising from many conditions are apt to change, for better or worse, over time, and the report loses relevance. That is why, in cases where an appellant believes that such papers may assist her case, she needs to raise that issue for the tribunal's consideration. As can be seen in *FN,* it is up to the tribunal to decide whether the papers are likely to be relevant

15 Tribunals in the Social Entitlement Chamber are alert to legal and evidential matters that are relevant but which would be obscure to a layman. They are accustomed to being pro-active in a way that would be foreign in other Chambers. But, as *FN* establishes, their proactivity is not boundless. A tribunal cannot pull a rabbit out of a hat unless it is given a hat to work with. The hat, in this case, is evidence from the appellant that there has been no change in their medical condition or disablement since a previous award or assessment.

16 When that is applied to this case, it is plain that the appellant cannot succeed. She simply does not indicate that she had a previous award of ESA, or that this was a condition which

[1] *FN* builds on the Northern Irish case of *JC v Department for Social Development (IB)* [2014] AACR 30. It accepts Upper Tribunal Judge May's decision in *AM v Secretary of State for Work and Pensions* [2013] UKUT 458 (AAC). *AM* accepts Upper Tribunal Judge Jacobs' decision in *CIB/1509/2004*.

was relevant to and continuing from a previous award, or that she has remained the same gotten worse. She did not meet the first part of the triggering condition.

17 The appellant also fails to satisfy the second part of the triggering condition approved by the Three Judge Panel in *FN v Secretary of State for Work and Pensions [2015] UKUT 670 (AAC) (CSE/19/2014).* This is because significant supervening events had taken place: the appellant failed the previous WCA, did not appeal the decision terminating her entitlement to ESA, and had claimed (and received) JSA for the next 9 months. If anything, her functionality had improved in a way that took her outside the relevant descriptors. Details of the previous assessment were no longer relevant.

18 I am unable to see any failure of the Tribunal in its inquisitorial duty in the circumstances of this case that might raise the possibility of an error of law beyond the principles in *FN.*

19 The F-tT dealt with all of the activities on the WCA even though the appellant had only indicated difficulty with getting around safely. On the evidence before it, it was entitled to find the facts as it did, and come to its conclusions.

[Signed on original] **S M Lane**

Judge of the Upper Tribunal

[Date] **22 November 2016**